Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

MARK STAPLES,

Petitioner,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,
TAXPAYER ADVOCATE BUREAU OF CALIFORNIA,
ATTORNEY GENERAL OF CALIFORNIA,
DEPUTY ATTORNEY GENERAL OF CALIFORNIA,
STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California
For The Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a State violates Due Process, Equal Protection, and Right of a citizen to Travel to a new state by requiring disclosure of income earned in the new state, by taxing that income, and by penalizing prosperity sought and solely gained in the new state. Whether a State further violates these rights by retaining jurisdiction over and delaying full citizenship to a taxpayer in the new state while at the same time disallowing the full privileges of the former State and subjecting a taxpayer to taxation without representation.

2. Whether non-judicial state agencies violate Due Process and Equal Protection by failing to advocate for a taxpayer as chartered to do so by state law and failing to give any opportunity to present objections to denial of a request for tax refund in a fair and neutral environment. In reliance on a realized conflict of state law, whether a state Court of Appeal errs in failing to rule on certain actions of a litigant in propria persona by declaring those actions were not initially presented precisely in writing to those very same non-judicial state agencies, thereby sustaining the violation of Due Process and Equal Protection, especially since those certain actions were generally stated initially, are of public importance which fulfills that Court's own requirement for review, and were subsequently presented properly to the actual judicial forums of review.

LIST OF PARTIES

Mark Staples, citizen and resident of the State of Delaware, is the petitioner herein. Franchise Tax Board of California, Taxpayer Advocate Bureau of California, Attorney General of California, Deputy Attorney General of California, and State of California are the respondents to the proceedings in the courts below.

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DECISIONS, OPINIONS, ORDERS, AND RECOMMENDATIONS BELOW

Petitioner's request letter for personal income tax refund was sent to Franchise Tax Board (Board) in June 1999, see Appendix (App.) pages A17 through A22. In 1999 and 2000, Board denied refund and the State Board of Equalization declined review of constitutional issues, citing state law. (App. A23-31) The tentative ruling, recusal, and continuance order of Department 53 along with judgement and order of Department 54 of the Superior Court of California, County of Sacramento all were filed in March and April 2001. (App. A33-35) The Superior Court denied the claim for tax refund. The opinion and judgement of the California Court of Appeal was filed on April 10, 2002 and ordered not published, denying one claim and ruling others were outside its jurisdiction. (App. A36-44) Following the appellate judgement, a petition for review of the appellate opinion was filed by petitioner with the California Supreme Court on May 13, 2002. On the same date, an untimely request by respondents to publish the opinion was filed with the Court of Appeal. (App. A45-47) In accordance with rule 978(a) of the California Rules of Court, the Court of Appeal forwarded the request to the Supreme Court of California on May 20, 2002 and recommended that publication be denied. (App. A48-49) The California Supreme Court en banc denied both the petition for review and the request for an order directing publication of the appellate opinion on June 19, 2002. (App. A50-51) Justice J. Kennard was absent and did not participate.

JURISDICTION

The petition for writ of certiorari was filed within ninety days of the denial of the petition for review by the Supreme Court of California. This Court has jurisdiction under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article IV of the Constitution of the United States, in pertinent part, provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Ninth Amendment to the United States Constitution insures: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment to the United States Constitution states, in relevant part affirms: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant California statutes, rules of court, and tax table are reprinted at Petitioner's Appendix pages A1-16. Code discussed within this petition is that of California, unless otherwise noted.

LACK OF COUNSEL

Petitioner conveys to this Court and any concerned that despite substantial effort to obtain legal counsel with willingness and ability to pay, he has been unable to do so. This petition is presented pro se.

STATEMENT OF THE CASE

This case involves two main areas of dispute. The first area concerns California's denial that part year resident income earned by traveling to and residing in another state is unconstitutionally taxed by California and California's assertion that it has jurisdiction to inquire as to the amount of income earned exclusively in another state. California exercises these two actions according to its Revenue and Taxation Code section 17041 as excerpted below.

> "(a) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident . . . taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of this state for the entire taxable year and for all prior taxable years . . . ."
>
> "(b) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident, . . . a tax which shall be equal to the tax computed under subdivision (a) as if the nonresident or part-year resident were a resident multiplied by the ratio of California adjusted gross income to total adjusted gross income from all sources."

Petitioner traveled from California to Delaware mid 1998 to establish residency there and gain prosperity. By taxing petitioner while he was an exclusive resident of Delaware for the latter half of 1998, California infringed on his Right to Travel and violates section 2 of Article IV, Amendment IV, Amendment IX, and

Amendment XIV of the Constitution of the United States of America.

The second disputed area involves the Court of Appeal's determination that a citizen and litigant in propria persona can be denied presentation of constitutional claims before it, if those publicly important claims were not made specifically and initially in writing to non-judicial state agencies of Franchise Tax Board and Taxpayer Advocate Bureau, respondents. The Court of Appeal further ruled that two such claims, of fraud by respondents and a conflict of law used by respondents in later judicial proceedings, were not admissible; even though they arose by actions of respondents after the proceedings before respondents. Neither did the Court of Appeal follow its own well established precedents requiring review of important public questions, including the foregoing claims and the claim of the Right to Travel. Due Process and Equal Protections provided by Amendment XIV were thus denied petitioner.

1. Mark Staples' Travel and Income Taxation

For about the first half of 1998 through June 12, Mark Staples resided, was a registered voter, and was employed exclusively in California.

On June 12, 1998 Mark Staples ended his residency and employment in California. In accordance with Cal. Rev. & Tax Code § 18663 (a), a total of $1,923 California tax had been withheld from the California his taxable wages of $28,880 at the end of his residency in California. (CT 97) [1]. The withheld tax was more than enough to pay the tax of $1,324 owed to California on total taxable income of $35,210 from wages and interest earned through June 12th,

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[1] CT refers to the Clerks Transcript on Appeal followed by the page(s) numbers of reference.

and some rental income earned throughout 1998, all from California sources [2].

On June 13, 1998 Mark Staples having traveled to Delaware, established residency there to gain more lucrative employment and to avoid likely unemployment should he stay in California. Through the remainder of 1998 Mark Staples resided, was a registered voter, and was employed exclusively in Delaware. Mark Staples increased his wages in Delaware, just as he anticipated he would by leaving California and traveling there. The prospect of unemployment had faced Mark Staples in California while Delaware provided secure employment and prosperity. The increase in taxable wages of Mark Staples went from $28,880 earned over 163 days in California to $49,202 earned over 202 days in Delaware. (wages from CT 97 & 98). His average per diem taxable wage climbed by over 35% from $177.18 in California to $243.57 in Delaware.

California did not grant the same means for tax withholding from the Delaware wages of Mark Staples as previously provided on his wages in California. Consequently, the excess tax withholding that Mark Staples had accrued in California was exhausted during his residency in Delaware by continued California taxation. The end result was that California demanded an extra lump sum tax payment of $541.59 (CT 9) from Mark Staples for his Delaware income.

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[2] Of the total taxable income of from California sources, the major portion was from wages as noted, with contibution from $1,945 of interest. Both were earned in the first half of the 1998 up to June 12th. The remaining income of $4,385 was earned from a California rental property roughly evenly throughout all of 1998. (amounts from CT 56 & 57)

2. California's Tax Scheme

California imposes an income tax on individuals in other states as mathematics reveals. To examine the tax scheme symbols are defined in Table 1 below.

Table 1: Components of Taxation

C	= California Income	= 35210
D	= Delaware Income	= 50238
S	= Standard Deduction	= 2642
L	= Lower Income Level	= 33673
P	= Partial Tax, on L	= 1482.57
R	= Tax Rate, on income > L	= 9.30 %
E	= Exemption	= 70

Bene Note: L is dictated by the sum of both California and Delaware Incomes (C + D). R is also dictated by the sum of C + D. All figures are those for petitioner and are in dollars ($), except R which is a percentage.

Income and tax are defined as a positive. The California tax scheme is then given by the following equation.

Equation 1: California's Tax Scheme [3]

$$\text{Tax} = [\, P + ((C + D) - S - L)\,x\, R - E \,]\; C/(C+D)$$

Respondents in proceedings below preferred a different expression of the tax scheme which can be obtained by multiplying Equation 1 through with the ratio of C/(C + D).

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[3] Constructed from NonResident or Part Year Resident Personal Income Tax Booklet 1998, State of California, Franchise Tax Board using Schedule X , the standard deduction, and the rent exemption and in acordance with Rev. and Tax. Code § 17041 (a) & (b).

Equation 2: Respondents' Preferred Tax Scheme [4]

$$\text{Tax} = P \times C/(C + D) + [C - S \times C/(C + D) - L \times C/(C + D)] \times R - E \times C/(C + D)$$

Factoring and combining like terms, Equation 2 can be simplified and placed in a form more amenable to analysis as given below.

Equation 3: California's Tax Scheme Simplified

$$\text{Tax} = R \times C - C/(C + D) [R \times S + R \times L - P + E]$$

For later discussion define:
Term 1 = $- C/(C + D) [R \times S + R \times L - P + E]$

Petitioner's incomes are now substituted into Equation 3 and the operations performed below.

Calculation 1: Tax (Simplified) on Delaware and California Incomes

$$\text{Tax} = 0.093 \times 35210 - 35210/(35210+50238) [0.093 \times 2642 + 0.093 \times 33673 - 1482.57 + 70]$$

$$\text{Tax} = 2465$$

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[4] Found in stepwise and specific fashion in repondents' Notice of Demurrer. (CT 168 & 169)

In looking at Equation 3, one sees that the variable, Delaware income, occurs in the denominator of the ratio and that a minus sign precedes the ratio of Term 1. It is the combination of the minus sign and placement of the Delaware income in the denominator of the ratio that has the effect of increasing tax when Delaware income is increased. (This is also due to the fact that RxC, RxL, and E will all be positive by definition and due to constraints on these, their sum will be greater than P.) Subtraction and division are combined in a way that directs the final tax to increase as Delaware income increases. Respondents have used these two operations, division and subtraction, to make the final tax dependent on Delaware income.

Another point needs to be made. That is, that Delaware income (D) is always an integral part of respondents' tax scheme. Note that Delaware income (D) does not and will not cancel out of respondents' tax scheme. That is to say, no mathematical operation, especially division or subtraction, removes the Delaware income. Thus the result, the tax, is always dependent on and always increased by Delaware income. Equations 1 through 3 reveal this. This dependency on Delaware income means that Delaware income is taxed.

Also, a very important point is that the rate of taxation, R, and lower limit of partial taxation, P, both are dependent not just on California income but on Delaware income as well. As Delaware income increases the rate of taxation increases.

The California tax scheme insures that as Delaware income increases the rate of taxation increases and the magnitude of deductions decrease. The final result is that an increase in Delaware income causes a correlated increase in California tax.

Another true test of whether Plaintiff's Delaware income was taxed is to remove the Delaware income from calculation and see whether the result is affected.

Delaware income, D, is removed from Equation 3 to give the following equation.

Equation 4: Tax Scheme on California Income Only

$$\text{Tax} = R \times C - C/(C)\,[R \times S + R \times L - P + E]$$

Which can be reduced to:

$$\text{Tax} = R \times C - R \times S - R \times L + P - E$$

And can be simplified to:

$$\text{Tax} = R\,[C - S - L] + P - E$$

As total income decreases, so does Lower Income Level, L, the Partial Tax on Lower Income, P, and the Tax Rate, R (California Form 540NR, Booklet 1998, p. 38). With only California income under consideration L = 26644, P = 920.25, and R = 0.080. With these new values, the calculation of tax solely on California income is given below.

Calculation 2: Tax on California Income Only

$$\text{Tax} = 0.080\,[35210 - 2642 - 26644] + 920.25 - 70$$

$$\text{Tax} = 1324$$

Including Delaware income in the calculation for tax yields a higher tax of $2465 than with its exclusion which gives a tax of $1324. Mathematical review reveals that California has taxed petitioner's Delaware income. Thus petitioner is entitled to a refund of the tax collected on his Delaware income. This refund is the difference in the results of Calculations 1 and 2 and is provided in Calculation 3 below.

Calculation 3: Tax Refund due Petitioner

$$\text{Tax Refund} = 2465 - 1324$$

$$\text{Tax Refund} = 1141$$

3. The Proceedings Below

In April 1999, respondent Franchise Tax Board (Board) sent notice to Mark Staples in Delaware that he owed $541.59 tax plus a late penalty to California. Mark Staples made several inquires to respondent on the constitutionality of the tax and asking how he might obtain a refund. Respondent finally informed Mark Staples that he could request a refund of the contested tax and that respondent Taxpayer Advocate Bureau would assist him.

(a) Franchise Tax Board and Taxpayer Advocate Bureau of California, Respondents. In June 1999 Mark Staples requested from Board a refund of 1998 income tax on his Delaware income of $1,141 plus interest. He copied the request to Taxpayer Advocate Bureau. (CT 17-20)

Later in June 1999, Taxpayer Advocate Bureau notified Mark Staples, without prior consultation with him, that his request for refund had been treated as a claim and then denied (CT 25-26). There was no unbiased review of the proceedings before Taxpayer Advocate Bureau and Franchise Tax Board.

(b) The State Board of Equalization of California. In case no. 29992, Mark Staples appealed the decision of respondents and later petitioned for rehearing to the Board of Equalization. Respondents argued against the refund and admonished the State Board of Equalization not to consider any federal constitutional issues (CT 47-53), stating they were misdirected. (per *Appeal of John H. Grace*, Cal. St. Bd. Of Equal., October 28, 1980 and *Appeal of Helen Lisle*, Cal. St. Bd. Of Equal., May 19,1981). The final decision by the Board of Equalization sustained the response by Board to deny the refund and forego review of constitutional issues.

(c) The Superior Court. In December 2000, Mark Staples filed his complaint against Board in Superior Court (CT 2-162). He brought ten counts which

amounted to three broad claims of: (1) taxation without representation, (2) the right to travel freely between states, and (3) fraud by Taxpayer Advocate Bureau. The first two claims were supported by logic, mathematical proof, and cause and effect analysis. The failure of Taxpayer Advocate to advocate for Mark Staples resulted in a claim of fraud under California Civil code section 3294 subdivisions (a) and (c).

Respondents demurred that the complaint failed to state a cause of action (CT 163-195). Board also alleged the constitutional right to travel and claim of fraud had to be specifically contained in the initial claim for refund to be within the jurisdiction of the Superior Court. By reference to *Atari, Inc. v. State Board of Equalization* (1985) 170 Cal.App.3d 665, 672 respondents argued that the constitutional claim had to be directed to respondents and the Board of Equalization at the outset (CT 170).

Here, respondents initiated a new legal claim and reversed their own earlier admonishment that constitutional claims were misdirected to the Board of Equalization. Board also informed the Superior Court that Mark Staples, being a taxpayer who made a request to non judicial respondents, could not, by having made such a request, initiate new legal claims. (per Cal. Tax. and Rev. Code §§ 19382 and 19322).

In March 2001, the Superior Court, Honorable Judge Charles Kobayashi, issued a tentative ruling sustaining the demurrer followed by a court ruling of recusal pursuant to California Civil procedure 170.1(a)(6) and continuance. The trial court also ruled that a new tentative ruling would issue (CT 222). The original tentative ruling was:

> "The gist of plaintiff's complaint is that Revenue and Taxation Code Section 17041 (b) is unconstitutional. It is not. The demurrer is sustained without leave to amend." (App. A11)

In March 2001, the demurrer came again before the Superior Court, Honorable Judge Joe S. Gray, and the re-issued tentative ruling was sustained without leave to amend. Later, a Judgment of Dismissal was entered and filed.

During court proceedings, Hon. Judge Gray conveyed: " ... I find that ... I cannot make any determination that the law is invalid [in this case], and so...as a trial judge, I'm bound by all the precedents..., and so I could not -- if I independently believed this was improper, I could not declare it so because I am bound by those precedents ..." (Reporter's Transcript on Appeal pp. 13 & 14) Hon. Judge Gray did not specifically reject any claims in court proceedings or in his judgment.

(d) The Court of Appeal. In August 2001, Mark Staples filed an appeal in the Court of Appeal, Third Appellate District. He stated the facts of the case and argued for review of all claims. Franchise Tax Board replied, argued against review of certain claims, and did not refute any fact, including that $151 of California tax resulted from Delaware prosperity.

In April 2002 the Court of Appeal stated that it affirmed the judgment of the Superior Court. In part, the Court of Appeal stated: "We find the trial court properly considered only the challenges enumerated in Staples's [sic] claim: taxation without representation." [App. A43). The Court of Appeal did not explain how it determined that the Superior Court had only considered taxation without representation. Such sole consideration is not evident in the record of proceedings before the Superior Court. The ruling of the Court of appeal did not address the constitutional Right to Travel nor the claim against respondents of fraud. The case was in large part decided on the basis of a conflict of state law, which the Court of Appeal realized but did not resolve. The Court of Appeal ordered its decision not to be published.

In May 2002 respondents requested that the Court of Appeal publish its decision in the case, relaying that Franchise Tax Board, respondent, defended an average of 123 taxpayer appeals a year on California's Tax Scheme for non-residents and part year residents for years 1999 through 2001. The request by respondents was untimely and per California rule of court 978(a) the Court of Appeal forwarded it to the California Supreme Court and maintained its decision not to publish the opinion.

In May 2002, essentially simultaneous to respondents' request to the Court of Appeal, Mark Staples petitioned the Supreme Court of California for review of the case, identifying constitutional violations in the ruling of the Court of Appeal.

(e) The California Supreme Court. On June 19, 2002, the California Supreme Court en banc denied Mark Staples' petition for review and respondents' request for an order directing publication of the appellate opinion. One Justice was absent and did not participate.

SUMMARY OF ARGUMENT

(1) The manner in which California includes out of state income in the calculation of personal income tax results in taxation of that out of state income by California. This taxation by California violates established constitutional law which prohibits a state from imposing a tax on income earned by a non resident in another state. The taxation of out of state income by California is apparent through cause and effect analysis, and through mathematics.

A tax, which increases solely as one particular income increases, with all other contributing factors remaining the same, is clearly a tax on the particular income causing the increase. A tax which increases as only out of state income increases is a tax on out of state income. Such is the tax scheme that California

unconstitutionally exercised on the Delaware income of petitioner. California instructs that its tax scheme be applied in steps. The initial step involves determining tax on income from all sources, both resident and non resident, "*as if* " the part year resident were a full year resident of California. Subsequently, California instructs that the tax on total income be multiplied by the ratio of resident income divided by the total of resident and non resident incomes. Through use of this ratio, respondents contend any tax on out of state income is eliminated. However, the only manner in which such elimination can occur mathematically is when the out of state income cancels out of the calculations. This cancellation does not happen, and has so been shown by mathematical proof. Mathematics along with cause and effect analysis, both show that California collects tax resulting singularly from Delaware income. Simply put, California taxes not only California income but Delaware income as well.

Respondents have provided no counter to the foregoing logical analyses. In this case, no counter from any source has been seen. In review below, there has been silence on these logical analyses, implying that law trumps logic and mathematics. Yet it remains fundamentally difficult to understand how a State may employ mathematics to determine a tax and then lawfully be permitted to ignore that very same discipline when explaining the nature of that taxation.

Several inequalities and legal inconsistencies arise from the California Tax scheme, resulting in further violations of the constitution. These include taxation without representation, penalty on interstate travel, non-jurisdictional demand of the amount of out of state income, unequal provision of income tax withholding in the new state of residence, tax penalty on prosperity gained out of state, and delay and denial of privileges routinely granted to a resident of a new state. This case presents each of these constitutional violations, and even though the nature of the taxation

may be in question, California does not contest that it taxed petitioner while he resided exclusively in Delaware. Thus the foregoing violations remain, even if California's interpretation of the Tax Scheme is adopted.

(2) The prior proceedings of this case have not been conducted properly and have resulted in violations of Due Process and Equal Protection for the petitioner. These violations were initially incurred at the sudden close of the proceedings before respondents, Franchise Tax Board and Taxpayer Advocate Bureau, both non-judicial state agencies charted by state law "to make certain that your [taxpayer's] rights are protected" [5]. Both agencies failed to protect the rights of taxpayer Mark Staples by abruptly ending his initial request of tax refund without any consultation with, advocacy for, or proper instruction to him, and without any unbiased review of the proceedings. As a result of these failures of respondents, the Court of Appeal declined to review Mark Staples' constitutional right to travel, the fraud by respondents in failing to advocate for him, and the late arising conflict of law brought by respondents which stated Mark Staples oppositely should not and must bring constitutional claims before the Board of Equalization and Respondents. Also the ruling of the Court of Appeal abdicated its own well established precedent which requires admission of generally stated claims and claims of public importance.

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[5] NonResident or Part-Year Resident Personal Income Tax Booklet 1998. Form 540NR Booklet 1998. State of California, Franchise Tax Board p 39. Also see Code of Rev. and Tax. § § 21001-21004 (App. A9-15).

ARGUMENT

I. BY INCLUDING INCOME EARNED THROUGH TRAVEL TO ANOTHER STATE IN TAXATION, CONCOMITANT WITH TAX INCREASE, CALIFORNIA TAXES THAT OUT OF STATE INCOME AND VIOLATES DUE PROCESS AND THE RIGHT TO TRAVEL.

A. Cause and Effect Analysis and Mathematics Reveal that California Taxed Delaware Income.

1. Cause and Effect

To help reveal the nature of the taxation in question, an analogy of a farmer is given. A farmer lives the first six months of the year in California and plants several acres with wheat. After harvest, the California tax collector appears, has the harvest tallied, and says "Of the 35,210 bushels of wheat you harvested, I am collecting 1,324 as tax."

The farmer says, "Okay", and the tax collector leaves with the tax. The farmer places the remaining wheat in silos and seeing the prospects for farming are better there, moves to Delaware.

For the second half of the year, the farmer grows beans in Delaware, fully expecting a more prosperous harvest than in California. Before year's end, the farmer brings in a new and predictably bountiful harvest. Unexpectedly, the California tax collector shows up around year's end at the Delaware farm.

The California tax collector says, "I see you have a new harvest of beans. Do not be concerned, I am not going to tax your beans. However, since I have tallied 50,238 bushels of beans, I am going to require you to give me an additional 1,141 bushels of the wheat."

To which the farmer replies, "Even though I'm paying you now in wheat, you are taxing my beans. That's just common sense. I already paid my tax on

my wheat and now I'm giving you an extra 1,141 bushels of wheat for my harvest of beans."

The farmer's last reply illustrates that the central point in this case is what is being taxed and not how the tax is paid. When Delaware proceeds are essential to collecting additional tax, and they are the only cause for that additional tax, then Delaware proceeds are taxed. To say otherwise is a distortion of meaningful language, at best.

The bean harvest was the only cause for the effect of tax increase, since it was the only applicable factor to change during the increase in tax. The wheat harvest was the same before, during, and after the collection of increased tax. Being unchanged, the wheat harvest cannot cause a new increase in tax. Both harvests comprise the only two factors determining the tax. Since the wheat harvest cannot cause the increase, the bean harvest must. Thus, both by process of elimination of the California wheat harvest and direct observation of the effect of the Delaware bean harvest, it is clear that California taxed the Delaware harvest.

The case of petitioner provides an actual example of this cause and effect. Simply make each harvest of the farmer an income of dollars, assign each bushel whether of wheat or beans a value of one dollar, and substitute a worker, petitioner, for the farmer. This then is the real example of petitioner. The one insignificant exception is that a relatively few California dollars were earned at the same time as Delaware dollars.

A parallel conclusion to the fictional example follows, that is, that California taxed the out-of-state income of petitioner. As with the imagined example, California dollars, being unchanged, are not a factor in tax increase. The only cause of tax increase is Delaware dollars. The effect is that Delaware dollars are taxed by California.

2. Mathematics

The mathematical proof given in the Appendix on pages A18 to 22 puts cause and effect in more rigorous terms. This proof examines the setup given prior as the California Tax Scheme. Using the proof, Table 2 below was constructed below. From this table, the California tax can be found for particular adjusted gross incomes by locating the intersection of the column under a California income with that of the row of a Delaware income. Doing this for petitioner's incomes, it is apparent that a tax of $2,465 was collected from petitioner by California on both his California income of $35,210 and his out of state Delaware income of $50,238.

Table 2 below looks like a tax table and operates like tax table for California because it is a tax table. If so inclined, California could construct such a tax table in finer increments, even to dollar intervals, to essentially cover most circumstances of taxpayers. (It is only the lack of an upper end on incomes that makes a complete table prohibitive or impossible.) As out of state income increases for any particular constant California income, California tax increases. Here again, out of state income is the only thing causing increased tax and hence is the thing being taxed.

For petitioner, Figure 1 below illustrates that once his California income of $35,210 had been earned and taxed, California collects further tax that grows higher in lockstep with his increasing Delaware income. As Delaware income increases, tax grows from $1,324 to $2,465

Logically, it is concluded that California taxes Delaware income. The question unresolved is whether this can be done legally.

Table 2

Tax Table of California and Delaware Adjusted Gross Incomes

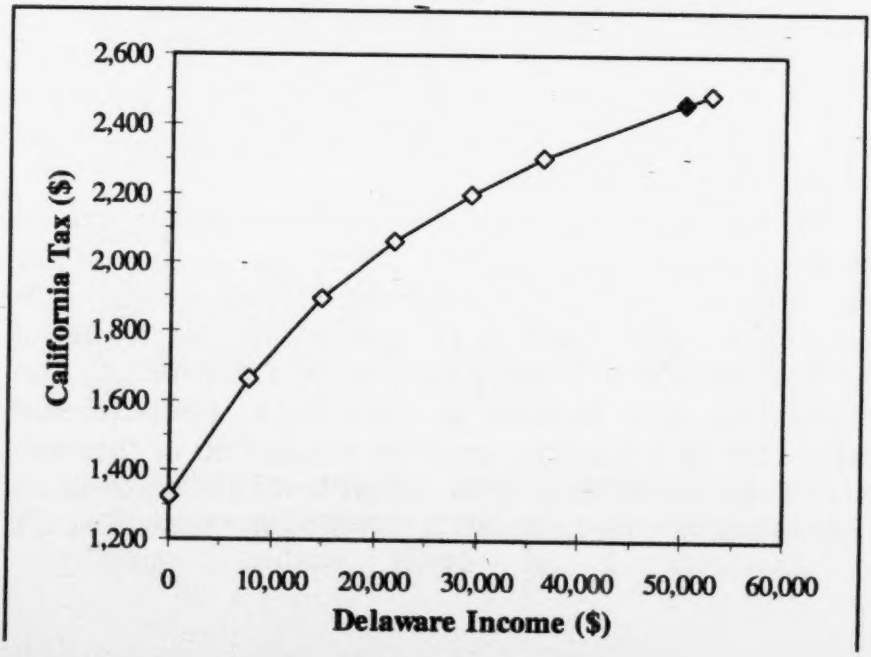
(Tax Calculated Using Standard Deduction of $2,642 and Exemption of $70)

		California Income ($)							
	Tax ($)	0	7,773	14,803	21,835	29,286	**35,210**	36,315	52,64
	0	0	0	122	403	850	**1,324**	1,413	2,93
Out	7,773	0	76	292	646	1,171	1,665	1,759	3,18
of	14,803	0	154	438	860	1,419	1,891	1,982	3,36
State	21,835	0	230	583	1,048	1,598	2,062	2,150	3,50
ncome	29,286	0	311	717	1,191	1,741	2,202	2,290	3,63
($)	36,315	0	376	808	1,293	1,846	2,307	2,395	3,73
	50,238	0	460	929	1,435	2,000	**2,465**	2,553	3,89
	52,642	0	470	945	1,455	2,021	2,487	2,575	3,91

Figure 1

California Tax Increase with Increase in Delaware Income (Out of State Income)

(California income is held constant at $35,210 when Delaware income reaches $50,238 a Tax of $2,465 results, the solid diamond)



3. The California Tax Scheme Penalizes Prosperity Sought and Gained in Delaware

Of the $1,141 California tax resulting from Delaware income, $151 of this is from the increased wages petitioner earned in Delaware (CT 144). Had petitioner maintained his California wage in Delaware, the prosperity tax of $151 on Delaware wages would not have resulted. Respondents have not refuted that this tax of $151 resulted from Delaware prosperity. The prosperity tax can be calculated using wages, of $28,879.96 for California and yearly wages of the actual $78,082.37 total and of the projected $64,669.85 total, the later of which is the California wage maintained throughout 1998. Calculation of tax owed on projected and actual wages gives a tax increase of $151 arising from Delaware prosperity alone. (CT 90 & 144)

B. There is no Nexus Between Delaware Income and California Income, the Right to Travel Creates Distinct Incomes

Neither petitioner nor respondents have located rulings directly on point to the main issue presented in this case, that is, personal state income taxation arising from interstate travel. The following excerpts from related cases do, however, provide relevant and compelling legal thought.

Recent opinions disallow out-of-state income to affect in-state tax, unless there is a nexus or connection of out-of-state income to that income. In the present case, there is no connection, or nexus, of the income Mark Staples earned in Delaware to the income he had earned in California. Respondents admit this by requiring separate tabulation of "income earned as CA resident or received from CA sources as a nonresident". (Schedule CA (540NR) for 1998, see CT

p 63). That tabulation was $35,210. Still, after making this distinction in source of income, respondents subsequently use income unique to Delaware to increase California tax, as previously shown. The following four excerpts address this and other issues of the present case.

> "It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States." (*Maxwell*, supra, at 544 [Justice Holmes, dissenting])

> "No state may impose a tax on income earned outside of the state by a nonresident. That is settled constitutional law."
>
> and
>
> "A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause -- no matter how the tax is described."
>
> (*Brady v. State of New York* (1992) 98-2043 [592 N.Y.S.2d 955, 607 N.E.2d 1060] [Hon. Judge Hancock, dissenting, see App. A51-58)

> "States may not tax income arising out of interstate activities --even on a proportional basis-- unless there is a 'minimal

> connection' or 'nexus' between such activities and the taxing State, and a 'rational relationship between the income attributed to the State and the intrastate values of the enterprise.' "
>
> *Container Corp. of America v. Franchise Tax Bd.* , 463 US 159 , 165-166. "(*Hunt-Wesson, Inc. v. Franchise Tax Board of California* (2000) 528 US 458.

> "The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."
>
> *Saenz v. Roe* (1999) 526 US 489, p 7

Without guidance from this Court regarding the applicability of the right to travel, free from tax penalty or other imposition by the state of departure, lower courts may be allowed to violate this constitutional right of citizens.

II. BY FAILING TO PROVIDE THE PRIVILEGES GRANTED TO RESIDENT TAXPAYERS AND DENYING THE ACQUISITION OF PRIVILEGES IN A NEW STATE TO PART YEAR RESIDENTS, CALIFORNIA VIOLATES DUE PROCESS AND EQUAL PROTECTION, AND DISCRIMINATES AGAINST INTERSTATE TRAVEL.

The actions and lack of actions of respondents in this case leave petitioner in a constitutional limbo. During the last half of 1998, respondents prevented

petitioner from acquiring the full rights of established citizens in Delaware and yet did not provide him the full rights of resident taxpayers in California.

Per *Saenz v. Roe, supra*, California violated the Right to Travel by penalizing the free travel of petitioner between states and subjecting him to discrimination upon arrival in his new state of residency. California discriminated against petitioner by preventing and delaying him from realizing the full privileges of citizenship in his new state, including freedom from the jurisdiction of California which includes freedom from California taxation.

In prior proceedings respondents narrowly and incorrectly maintained that *Saenz v. Roe, supra* did not apply since the treatment of those leaving California was the same as those entering California. However, the argument does not rest on this limited view. The argument concerns not just the California perspective but the perspective of residency in the new state. In the present case, the argument encompasses the delay California imposes on a traveler in gaining full privileges equal to those of established residents. The argument also includes the right of a traveler to seek prosperity in a new state without penalty, especially when such prosperity is absent in the state of departure, California. On these essential considerations, respondents give no reply.

Furthermore, just applying equal treatment does not guarantee that the treatment is constitutional. The question reduces to why a person would be penalized for traveling in the first place.

A. By Granting Tax Withholding to Taxpayers Employed in California But Not to Taxpayers Employed in Other States, California Violates Equal Protection.

Mark Staples was not given the privilege of California payroll tax deduction in Delaware (CT p. 98). California gives this privilege to full year residents and

non-residents employed in California (Revenue and Taxation Code § 18663 (a), vide sub). California does not give this privilege to part year residents who are employed exclusively in another state.

When Mark Staples was an exclusive resident of Delaware, he accrued much more tax obligation to California. Yet California did not require the Delaware employer of Mark Staples to withhold any California income tax. Furthermore, the wages of Mark Staples increased substantially in Delaware, further increasing his tax obligation to California. Almost entirely as a result of these increased wages, California coerced Mark Staples to pay a considerable lump sum of $541.59 in extra tax (CT p. 9).

Payroll tax withholding would have reduced or eliminated this burden and penalty of lump sum payment. California and Respondent failed to give Mark Staples the same provision provided to other employed taxpayers as noted in the code which follows.

> "Revenue and Taxation Code
> 18663. (a) The Franchise Tax Board shall annually ... make available ... wage withholding tables which shall be used by every employer making payment of any wages to a resident employee for services performed either within or without this state; or to a nonresident employee for services performed in this state ...."

The ruling of the appellate court then neglects Article IV and Amendment XIV of the U.S. Constitution. There was no Equal Protection for Mark Staples in tax withholding.

B. By Taxing Part Year Residents During Exclusive Residency in Another State and Failing to Provide Representation, California Subjects Part Year Residents to Taxation WithOut Representation.

It is established that California continued to tax Mark Staples while he was an exclusive resident of Delaware. This fact is admitted by all parties in this case. Additionally, respondents themselves repeatedly informed Mark Staples that he had no representation in California government while he was taxed in Delaware. The conclusion readily follows that California subjected Mark Staples to taxation without representation. This violates the Due Process and Equal Protection clauses of Amendment XIV.

C. By Requiring Disclosure of Income Earned Exclusively in Another State for Determination of Tax, California is Acting Beyond Its Constitutional Reach.

There is no constitutional authority permitting California to exact disclosure of income earned exclusively out-of-state. California has assumed a power not granted to it.

III. BY FAILURE OF BOTH FRANCHISE TAX BOARD AND TAXPAYER ADVOCATE BUREAU TO ADVOCATE FOR A TAXAPAYER, AND BY FAILURE OF THE STATE COURTS TO ABIDE BY THEIR OWN PRECEDENT, DUE PROCESS AND EQUAL PROTECTION WERE DENIED FOR A LITIGANT IN PROPRIA PERSONA.

A. Franchise Tax Board and Taxpayer Advocate Bureau Did Not Advocate for Petitioner, a Taxpayer, as Required by State Law and Did Not Provide Impartial Review as Required in Due Process.

The action and lack of action of Taxpayer Advocate Bureau for taxpayer Mark staples did not fulfill the "Katz-Harris Taxpayers' Bill of Rights Act" found in California Rev. and Tax. Code as given below. Neither did Taxpayer Advocate Bureau act in accordance with *Miranda* which establishes the principle that citizens cannot involuntarily be deprived of constitutional rights.

> " REVENUE AND TAXATION CODE
>
> 21001. This part shall be known and may be cited as the ' Katz-Harris Taxpayers' Bill of Rights Act.'
>
> 21002. . . . It is the intent of the Legislature to place guarantees in California law to ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of the assessment and collection of taxes.
>
> . . . It is the intent of the Legislature that, in the furtherance of this purpose, the Franchise Tax Board may inquire into, and shall allow the taxpayer every opportunity to present, all relevant information pertaining to the taxpayer's liability.
>
> 21003. . . . For purposes of this part, 'board' means the Franchise Tax Board.
>
> 21004. (a) The board shall establish the position of the Taxpayers' Rights Advocate. The advocate or his or her designee shall be responsible for coordinating resolution of taxpayer complaints and problems, including any taxpayer complaints

> regarding unsatisfactory treatment of taxpayers by board employees. . .
>
> 21021. (a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action or omission may bring an action for damages against the State of California in superior court. "
>
> [emphases by petitioner]

Fraud certainly is an occurrence where an "employee of the board recklessly disregards board published procedures". Thus bringing such an action as petitioner did, a claim of fraud by Board, was entirely within, not only the jurisdictional review of the superior court, but subsequently the appellate court as well. Neither court ruled on this action, in violation of state and constitutional law.

B. The Ruling of the Court of Appeal Failed to Provide Due Process and Equal Protection

Advising against the view of the Court of Appeal, Honorable Justice Warren authored an opinion, stating:

> "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them." (*Miranda v. Arizona* (1966) 384 U.S. 436.)

Also as noted in Miranda a citizen must be advised of the constitutional right against self-incrimination before relinquishing it. The general principle of such advice, not to involuntarily relinquish constitutional rights, was not given to Mark Staples by Taxpayer

Advocate Bureau nor by Franchise Board. This is even of greater concern since both Taxpayer Advocate Bureau and Franchise Tax Board are chartered to do just that, which is to advise taxpayers of their rights.

Another important aspect of this issue is what due process must be allowed in proceedings for constitutional claims. In this case, the constitutional Right to Travel to Delaware was indicated in a refund request letter to Franchise Tax Board. Taxpayer Advocate Bureau, acting for Franchise Tax Board, then abruptly denied the request. The appellate court interprets this abrupt denial to be adequate to reject any rights not cited in the narrow manner prescribed by state law (Rev. and Tax. Code § 19322).

Yet Rev. and Tax. Code § 19322 specifying refund action before Franchise Tax Board and requiring legal citation of the constitutional rights is opposed by the U.S. Constitution itself, especially as found in *Saenz v. Roe* (1999) 526 U.S. 489 (*Saenz*) and also as evident in state precedent of *Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal. 3d 861, 870-871, 718 P.2d 106, 112 (*Lindeleaf*) and *Hale v. Morgan* (1978) 22 Cal. 3d 388, 394, 584 P.2d 512, 516 (*Hale*). Both *Lindeleaf* and *Hale* require that issues of public importance brought by a litigant must be heard by state courts, even if those issues were not presented in the specifically written manner prescribed by Rev. and Tax. Code § 19322. Thus the publicly important issues of the constitutional Right to Travel, alleged fraud by public agencies, and the conflict of state law all were within the jurisdiction of the Court of Appeal. Failure of the Court of Appeal to realize its jurisdiction violated Equal Protection for petitioner.

The Court of Appeal was silent on *Lindeleaf* and *Hale* ruling that issues of the constitution were outside its jurisdiction due to oversights in early proceedings. The Court of Appeal decided the case primarily by using the conflict of law proffered by respondents. The Court of Appeal took the late arriving position of

respondents in this conflict stating that Mark Staples should have initially made all claims in specific legal manner to Franchise Tax Board, no matter that the genesis of the claim of fraud and conflict of law were actions of respondents that occurred after non-judicial Taxpayer Advocate Bureau unilaterally and abruptly ended the proceedings before it. Thus not only did the Court of Appeal not resolve the conflict of law but used that very conflict to decide the case.

Also, the Court of Appeal granted respondents the unique privilege to bring novel legal actions, such as the conflict of law, after Board proceedings had ended. This privilege was explicitly denied to Mark Staples and thus violates Equal Protection and Due Process. Mark Staples did not have the privilege of early review of respondents' reversal in the conflict of law, whereas respondents had early review of all actions of Mark Staples.

Petitioner and respondents were not equal litigants before the Court of Appeal. Any new action of petitioner post proceedings of Taxpayer Advocate Bureau and Franchise Tax Board were fettered or prohibited while any of those of respondents were admitted, even when respondents disagreed with their own earlier actions.

CONCLUSION

For the foregoing reasons, the judgement of the California Court of Appeal should be reversed.

Respectfully submitted,

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September 2002

CALIFORNIA STATUTES
(All statutes in this Appendix are for California unless stated otherwise)

Civ. Code § 3294 subdivisions (a) and (c)

CIVIL CODE

3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the

defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Code of Civ. Pro. §§ 170 and 170.1(a)(6)

CODE OF CIVIL PROCEDURE

170. A judge has a duty to decide any proceeding in which he or she is not disqualified.

170.1. (a) A judge shall be disqualified if any one or more of the following is true:

(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

Code of Civ. Pro. § 904.1(a)(1)

CODE OF CIVIL PROCEDURE

904.1. (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), (B) a judgment of contempt that is made final and conclusive by Section 1222, or (C) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or the superior court in a county in which there is no municipal court or the judge or judges thereof that relates to a matter pending in the municipal or superior court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

Government Code § 815.6

GOVERNMENT CODE

815.6. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Code of Rev. and Tax. § 17041 (b)

REVENUE AND TAXATION CODE

17041. (a) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident, . . . taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of this state for the entire taxable year and for all prior taxable years . . .

(b) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident, . . . a tax which shall be equal to the tax computed under subdivision (a) as if the nonresident or part-year resident were a resident multiplied by the ratio of California adjusted gross income to total adjusted gross income from all sources . . .

Code of Rev. and Tax. § 19382

REVENUE AND TAXATION CODE
SECTION 19382

19382. Except as provided in Section 19385, after payment of the tax and denial by the Franchise Tax Board of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring an action, upon the grounds set forth in that claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid.

Code of Rev. and Tax. § 21006 (2)(c)(1)
REVENUE AND TAXATION CODE

Code of Rev. and Tax. 21006

(2) ...

(c) The board shall include in its report recommendations for improving taxpayer compliance and uniform administration, including, but not limited to, all of the following:

(1) Changes in statute or board regulations.

Code of Rev. and Tax. § § 21001-21004, 21007, 21010, 21011, & 21013

REVENUE AND TAXATION CODE

21001. This part shall be known and may be cited as the "Katz-Harris Taxpayers' Bill of Rights Act."

21002. The Legislature finds and declares that taxes are the most sensitive point of contact between citizens and their government, and that there is a delicate balance between revenue collection and freedom from government oppression. It is the intent of the Legislature to place guarantees in California law to ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of the assessment and collection of taxes.

The Legislature further finds that the California tax system is based largely on self-assessment, and the development of understandable tax laws and taxpayers informed of those laws will improve both self-assessment and the relationship between taxpayers and government. It is the further intent of the Legislature to promote improved taxpayer self-assessment by improving the clarity of tax laws and efforts to inform the public of the proper application of those laws.

The Legislature further finds and declares that the purpose of any tax proceeding between the Franchise Tax Board and a taxpayer is the determination of the taxpayer's correct tax liability. It is the intent of the Legislature that, in the furtherance of this purpose, the Franchise Tax Board may inquire into, and shall allow the taxpayer every opportunity to present, all relevant information pertaining to the taxpayer's liability.

21003. The Franchise Tax Board shall administer this part. Unless the context indicates otherwise, the provisions of this part shall apply to Part 10 (commencing with Section 17001) and Part 11 (commencing with Section 23001).

For purposes of this part, "board" means the Franchise Tax Board.

21004. (a) The board shall establish the position of the Taxpayers' Rights Advocate. The advocate or his or her designee shall be responsible for coordinating resolution of taxpayer complaints and problems, including any taxpayer complaints regarding unsatisfactory treatment of taxpayers by board employees. The advocate shall report directly to the executive officer of the board.

(b) The advocate or his or her designee shall give highest priority to reviewing and taking prompt and appropriate action, including staying actions where taxpayers have suffered or will suffer irreparable loss as the result of board action. Applicable statutes of limitation shall be tolled during the pendency of a stay. Any penalties and interest which would otherwise accrue shall not be affected by the granting of a stay.

. . .

21007. The board shall prepare and publish brief but comprehensive statements in simple and nontechnical language which explain procedures, remedies, and the rights and obligations of the board and taxpayers. As appropriate, these statements shall be provided to taxpayers with the initial notice of audit, the notice of proposed additional taxes, any subsequent notice of tax due, or other substantive notices. Additionally, the board shall include an appropriate statement in the tax booklets which are mailed annually to individuals

and corporations. The board also shall include an appropriate statement in the tax booklets informing taxpayers they may be requested by the board to furnish a copy of California or federal tax returns that are the subject of or related to a federal audit.

. . .

21010. No later than July 1, 1989, the board shall, in cooperation with the State Board of Equalization, the State Bar of California, the California Society of Certified Public Accountants, the Taxpayers' Rights Advocate, and other interested taxpayer-oriented groups, develop a plan to reduce the time required to resolve amended return claims for refund, protests, and appeals. The plan shall include determination of standard time frames and special review of cases which take more time than the appropriate standard time frame.

21011. Procedures of the board, relating to protest hearings before board audit staff or legal staff, shall include all of the following:

(a) Any hearing shall be held at a reasonable time at a board office which is convenient to the taxpayer when possible.

(b) The hearing may be recorded only if prior notice is given to the taxpayer and the taxpayer is entitled to receive a copy of the recording.

(c) The taxpayer shall be informed prior to any hearing that he or she has a right to have present at the hearing his or her designated agent.

21013. (a) (1) Every taxpayer is entitled to be reimbursed for any reasonable fees and expenses related to an appeal before the State Board of Equalization if all of the following conditions are met:

(A) The taxpayer files a claim for the fee and expenses with the State Board of Equalization.

(B) The State Board of Equalization, in its sole discretion, finds that the action taken by the Franchise Tax Board staff was unreasonable.

(2) For purposes of this section:

(A) Fees and expenses related to an appeal before the State Board of Equalization do not include fees and expenses incurred in cases where an appeal has been filed, but resolved before the Franchise Tax Board's written statement of its position has been submitted to the State Board of Equalization.

(B) Fees may be awarded in excess of the fees paid or incurred if the fees are less than the reasonable fees because an individual representing the taxpayer is entitled to be reimbursed for no fee or for a fee which, taking into account all the facts and circumstances, is no more than a nominal fee. This subparagraph shall apply only if the award is paid to the individual or the individual's employer.

(b) (1) To determine whether the Franchise Tax Board staff has been unreasonable, the State Board of Equalization shall consider whether the Franchise Tax Board has established that its position in the appeal was substantially justified.

(2) For purposes of paragraph (1), the position of the Franchise Tax Board shall be presumed not to be substantially justified if its staff did not follow its applicable published guidance in the appeal. This presumption may be rebutted.

(3) For purposes of paragraph (2), the term "applicable published guidance" means either of the following:

(A) A regulation, legal ruling, notice, information release, or announcement.

(B) Any chief counsel ruling or determination letter issued to a taxpayer.

(c) The amount of reimbursed fees and expenses shall be determined by the State Board of Equalization and shall be limited to the following:

(1) Fees and expenses incurred after the date of a notice of proposed deficiency assessment or jeopardy assessment, or a denial of a claim for refund.

(2) If the State Board of Equalization finds that the Franchise Tax Board staff was unreasonable with respect to certain issues but reasonable with respect to other issues, the amount of reimbursed fees and expenses shall be limited to those which relate to the issues where the Franchise Tax Board staff was unreasonable.

(d) Any proposed determination by the State Board of Equalization pursuant to this section shall be available as a public record for at least 10 days prior to the effective date of that determination.

(e) The amendments made by the act amending this subdivision are effective for fees and expenses incurred more than 180 days after the effective date of the act amending this subdivision.

. . .

21021. (a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action or omission may bring an action for damages against the State of California in superior court.

(b) In any action brought under subdivision (a), upon a finding of liability on the part of the State of California, the state shall be liable to the plaintiff in an amount equal to the sum of all of the following:

(1) Actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions.

(2) Reasonable litigation costs, as defined for purposes of Sections 19420 and 26491.

. . .

California Rules of Court, Rule 978

Rule 978. Requesting publication of unpublished opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by a letter stating the nature of the person's interest and stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

(Subd (a) amended effective July 1, 1997; adopted July 1, 1975; previously amended January 1, 1983, and July 1, 1992.)

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

(Subd (b) amended effective January 1, 1983; adopted effective July 1, 1975.)

(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of

an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

(Adopted effective July 1, 1975.)

CALIFORNIA TAX FUNCTIONS

PERONAL INCOME TAX BOOKLET
1998
NONRESIDENT OR
PART-YEAR RESIDENT
CALIFORNIA
FORMS & INSTRUCTIONS

(Form 540 NR Booklet 1998)

taken from p 38
and tax functions named **f1**, **f2**, and **f3**

If the amount on Form 540NR line 19 is:		Enter on Form 540 NR, line 22		of the amount over-
Over -	But not over-			
		f 1	**f 2**	**f 3**
$ 0	$ 5,131	$ 0.00 +	1.0 %	$ 0
5,131	12,161	51.31 +	2.0 %	5,131
12,161	19,193	191.91 +	4.0 %	12,161
19,193	26,644	473.19 +	6.0 %	19,193
26,664	33,673	920.25 +	8.0 %	22,664
33,673	and over	1,482.57 +	9.3 %	33,673

[Note: Line 19 of Form 540NR is "your taxable income", that is, federal adjusted gross income minus California deductions and with any California adjustments.]

LETTER OF REFUND REQUEST TO FRANCHISE TAX BOARD

Mark Alan Staples
P.O. Box 1280
Bear, Delaware 19701
June 14, 1999

Regime of California
Franchise Tax Board
P.O. 942867
Rancho Cordova, CA 95741

CC: Taxpayer Advocate Bureau
P.O. Box 157
Sacramento, CA 94267-0011

My confidential social security number: [omitted for security]
Regarding: Taxation without Representation
Correction [made] to page 4: Replace[d] "CA" with "CX"

Dear Tyrant:

You have unlawfully imposed a tax on me. You have taxed income that I earned outside your regime while I was a resident of the State of Delaware. I fled your regime to reside elsewhere and pursue happiness. I earned more income in the State of Delaware than I ever would have earned in your regime. You then persecuted me and imposed an unlawful tax on this income. You have violated my rights as a citizen of the United States of America by this tax. Furthermore, you have refused to send me your tax forms. You have refused to allow me to file a complaint. You have threatened to financially ruin me and illegally seize my property. You provided me written instructions which when executed by me were disregarded by you.

When I phoned your representatives, they laughed at me when I informed them I was a citizen of the United States of America. I phoned more than three times requesting information be sent to me. My early requests were ignored and only after repeated requests did I receive information that I could act upon, which was not what I requested and which was sent too late. Your regime imposed further tyranny upon me in the form of a late penalty. I believe these acts to be deliberate persecution. I call upon you to cease and desist and restore the money to me that was illegally coerced from me under threat of financial ruin.

I asked at least three of your representatives to explain the arithmetic and logic of the unlawful tax. None could, but each recited, as if by rote and not with understanding, that my income in the State of Delaware was subject to tax by the regime of California. I asked these same clerks whether any elected official represented me in your regime while I was a resident of Delaware. I was told none did. This is taxation without representation. I could not vote within your regime to ease my plight or effect the disbursement of collected taxes. No representative in your regime hears or cares of my concern. Such is the tyranny of California.

I will now demonstrate that my income in Delaware has been taxed by your regime. I will prove my income as a resident of the State of Delaware increases the tax imposed upon me by California.

I will give the general equation for the tax. Then I will demonstrate unequivocally and by my example that your regime has taxed my income earned as a resident of Delaware.

Definition of terms and conditions:

CA = taxable income earned as resident of California
ID = itemized deduction for California income
EX = Exemption for California
OS = taxable income earned as resident of a state (not the regime of California)
TX = tax illegally imposed by the regime of California
CX = tax by California allowable

The sum of CA + OS is more than $50,000.00
and
CA - ID is equal to or greater than 0

f1[ ] = function one, $ amount under column "Enter on Form 540NR, line22"
defined on page 38 of Form 540NR Booklet 1998
f2[ ] = function two, % under column "Enter on Form 540NR, line22"
defined on page 38 of Form 540NR Booklet 1998
f3[ ] = function three, $ amount under column "of the amount over-"
defined on page 38 of Form 540NR Booklet 1998

Consequences of conditions and definitions of functions:

f1[ ] will only yield 0 or some positive number
f2[ ] will only yield some positive decimal fraction in the range of 0.010 to 0.093
f3[ ] will only yield a value of 0 or some positive number

Furthermore, if OS is greater than 0:

f1[CA - ID + OS] is always greater than or equal to f1[CA - ID]
and
f2[CA - ID + OS] is always greater than or equal to f2[CA - ID]
and
f3[CA - ID + OS] is always greater than f3[CA - ID]

f3[ ] will be of the nature, that X must be greater than or equal to 0 and:

f3[CA - ID + OS] = (CA - ID + OS) - X
Computation of the tax imposed by the regime of California:

$$TX = \frac{(CA)}{(CA + OS)} \times (f1[CA - ID + OS] + f2[CA - ID + OS] \times f3[CA - ID + OS] - EX)$$

and

TX is equal to or greater than 0.

The functions f1[ ], f2[ ], and f3[ ] are so constructed that TX remains a function of CA and OS and TX increases as either or both of CA and OS increase.

Legal computation of tax (or OS equals 0):

$$CX = \frac{(CA)}{(CA)} \times (f1[CA - ID] + f2[CA - ID] \times f3[CA - ID - EX)$$

or

$$CX = (f1[CA - ID] + f2[CA - ID] \times f3[CA - ID] - EX)$$

Now here is my example where (in $):

CA = 35,210
OS = 50,238
CA + OS = 85,448

ID = 2,642
CA - ID = 32,568
CA - ID +OS = 82,806

EX = 70

Further to my proof, both CA and OS are for equal periods (six months) and OS is greater than CA. (A primary reason that I fled California.) Now calculate, according to Form 540NR Booklet 1998:

TX = (35,210) x (f1[82,806] + f2[82,806]x f3[82,806]
(85,448)

- 70)

TX = (0.4121) x ((1,482.57) + (0.093)x (49,133) - 70)

TX = 2,465

Now, the correct tax [of] California is calculated, without using income earned while a resident of the State of Delaware:

CX = (f1[32,568] + f2[32,568] x f3[32,568] - 70)

CX = (920.25) + (0.080) x (5,924) - 70)

CX = 1,324

1,324 is not equal to 2,465

CX is not equal to TX

Furthermore,

TX > CX

Q.E.D.
Quid Est Demonstratum.
What was to be demonstrated has been demonstrated.

California has taxed my income earned while a resident of the State of Delaware. I demand California immediately reimburse me for this injurious practice and any penalties imposed. The tax amount to be returned is $1,141.00 plus interest. The penalty, as of this date, to be returned is $32.18 plus interest.

Failure to do so will result in lawful seizure of property of California under Federal authority. Under law, I will also seek and obtain proportional damages to those that California has inflicted upon me. Further penalties may be imposed for violating the rights of citizens of the United States of America, for failure to address a citizen's complaint, and degradation and humiliation of a citizen.

I will not recognize California as a State within the United States of America until such time as California restores the rights of citizenship to others and me. You are and remain a tyranny until that time. I act against you, not only for myself, but also for all others who cherish liberty and democracy.

Signed,

s/_____

Mark Alan Staples
Citizen of the United States of America

TAXPAYER ADVOCATE REPLY LETTER

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
P.O. Box 157
Rancho Cordova, CA 95741-0157
Telephone (916) 845-4300
FAX (916) 845-6614

June 30, 1999

Mark A. Staples
P.O. Box 1280
Bear, DE 19701

Dear Mr. Staples:

I am writing in response to your letter received June 9, 1999 regarding your 1998 tax year.

In your letter you questioned the method that used to calculate your 1998 state tax. California law provides the specific method to be used to determine the tax liability of a nonresident or part-year resident taxpayer. California Revenue and Taxation Code section 17041, subdivision (b), provides that for each taxable year there shall be imposed upon the entire taxable income of every nonresident or part-year resident a tax on income received from sources in California.

The tax is equal to the tax computed as if the nonresident or part-year resident were a full year resident of California and then multiplied by the ratio of California source adjusted gross income [AGI] to total AGI from California and non-California sources. California's method of computing the tax liability does not impose a tax on the taxpayer's income from sources outside of California (non-California source income).

The State Board of Equalization (Board) has consistently held that this method of computing a nonresident's tax is not the same as a tax on non-California income. The Board considered this issue in the Appeal of Lois N. Million, 87-SBE-036, May 7, 1987, where the taxpayer argued that he had only lived in California two or three months and that California was taxing both his California and non-California income. The Board held that the taxpayer had misconstrued the action of the Franchise Tax Board (FTB). The Board stated that under the law, the FTB was not taxing the taxpayer's non-California source income, but had merely used the taxpayer's total income from all sources to determine the rate of tax and then used the applicable ratio (or percentage) to determine the California tax.

Since your tax for your 1998 tax year is paid, I am treating your letter as a claim for refund. As I explained, your 1998 tax of $2,465 was calculated in accordance with the previously mentioned California Revenue and Taxation section 17041 subdivision (b). Therefore I must deny your claim of $2,465 [sic, $1,141].

The law provides that you may appeal my decision within 90 days from the date of my letter. I am enclosing Personal Income Tax Procedure for Filing an Appeal from the Denial of a Claim for Refund, form 1084, that explains our appeal procedures.

I am sorry that I cannot be of further assistance to you in this matter.

Sincerely,
s/_____
Janet Jennings
Taxpayer Advocate Bureau

Enc.

APPEAL OF MARK ALAN STAPLES TO THE BOARD OF EQUALIZATION

BOARD OF EQUALIZATION DECISION

Adopted June 15, 2000

CALIFORNIA STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL
DECISION

NOT TO BE CITED AS PRECEDENT

Appellant	Year	Claim for Refund[1]
Mark Staples	1998	$2,465
Case No. 29992		

Representing the Parties

For Appellant:
Mark A. Staples
For Franchise Tax Board:
Greg W. Heninger, Legal Analyst

Counsel for Board of Equalization:
John Frankot, Tax Counsel

QUESTIONS:

(1) Whether respondent properly calculated the tax due on appellant's California-source income.
(2) Whether a late payment was properly imposed and whether appellant has established reasonable cause for relief from penalty.
(3) Whether interest should be abated.

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[1] According to respondent $2,465.00 is appellant's correct total part-year resident California tax liability; however, his claim is actually for a refund of $1,141.00 in tax ($2,465.00 less $1,324.00 appellant contends is the correct total tax), and for a late payment penalty ($29.78) and interest (0.33).

FINDINGS AND DETERMINATION

During mid 1998, appellant mover from California to Delaware. Appellant states he made several requests to respondent for the appropriate California tax forms he needed in order to file his 1998 California return [2]. Appellant states that he receive the requested forms on March 22, 1999, which left him with insufficient time to properly complete and file his 1998 return by the April 15, 1999, due date; nonetheless he completed his 1998 California return ". . . as best as was possible . . . ." [3] Appellant used only his California-source income as taxable income, in calculating the amount of California tax due.

Respondent states that appellant filed his 1998 part-year resident return on April 1, 1999, and several errors in the return were corrected during the processing. As a result, respondent issued a Return Information Notice for additional tax on April 6, 1999, and received appellant's full payment of the tax on May 3, 1999. Respondent states that appellant filed a claim for refund on June 9, 1999, which was denied on June 30, 1999. (See Rev. & Tax. Code, §§ 19322 & 19323.) This appeal followed. (see Tec. & Tax. Code §§ 19324, subd. (a), 19332 & 19333.)

Appellant contends that respondent's determination of his 1998 tax liability improperly assesses tax on his Delaware-source income. And, appellant disputes the late payment penalty on the grounds that he made late payment because

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[2] According to appellant, his request were made by telephone on January 5, February 2, and March 1, 1999.

[3] Appellant states that he filed the return ". . . shortly after March 27, 1999. . .," because he was unable to work on it between March 27, and April 15, 1999. Appellant further states that he felt ". . . there was some time available should the return need correcting. . . ." (App. Reply Br., p. 4)

respondent unreasonably delayed providing him with tax forms that he requested; further, it appears that appellant disputes the interest on the same grounds. Appellant asserts respondent's determination of his tax liability and denial of his claim for refund is in violation of his constitutional rights to interstate travel, and various other rights based on provisions of the United States Constitution. Finally, appellant alleges various abuses, including fraud, by respondent's Taxpayer Advocate Bureau.

Respondent contends that it has correctly determined appellant's 1998 tax liability under the provisions of Revenue and Taxation Code section 17041, and appellant has not established reasonable cause for relief from the late payment penalty. As to the assessment of interest, respondent contends that we do not have jurisdiction to consider relief, and even if we did, such relief would not be proper.

Revenue and Taxation Code section 17041, subdivision (a), provides in pertinent part:

> "(a) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state, . . . taxes in the following amounts and at the following rates upon the amount of taxable income. . . . "

Revenue Taxation Code section 17041, subdivision (b), provides in pertinent part:

> "(b) There shall be imposed for each taxable year upon the entire taxable income of every nonresident or part-year resident which is derived from sources in this state, . . . a tax which shall be equal to the tax computed under subdivision (a) as if the nonresident or part-year resident were a resident multiplied by the ratio of California adjusted gross income to total adjusted gross income from all sources."

The fundamental fairness of the above-described method of taxing California-source income of nonresidents and part-year residents has been upheld by New York's highest court, and the United States Supreme Court refused to hear an appeal from the New York decision. (Brady v. New York (1992) 80 N.Y.2d 596, cert. Den. (1993) 509 U.S. 905.) The purpose of the method is to apply the graduated tax rates to all persons – not just those who live in California for the full year. The progressive (graduated) tax rates are designed to apportion the tax burden on ability to pay. The method does not tax out-of-state sources of income; it merely takes the out-of-state income into consideration in determining the tax rate that should apply to California-source income. (Appeal of Louis N. Million, 87-SBE-036, May 7, 1987.)[4]

Revenue and Taxation Code section 17041 provides that the tax applicable to appellant's taxable income from all sources shall be calculated, after which the actual California tax liability shall be factored from that tax by application of the ratio of California AGI to total AGI from all sources. This is the method respondent used to determine appellant's 1998 tax liability. California tax has not been assessed on any of appellant's income that was derived from sources outside California; it has only assessed on the California-source income he earned during the

---

[4] The Brady court reasoned that similarly situated taxpayers were those with the same total income. For example, a nonresident earning $20,000 in New York, but with $100,000 reported total income , should be taxed on the $20,000 New York-source income at the same rate as a New York resident with $100,000 total income (and not at the same rate as a New York resident with $20,000 total income). In Brady, not using the taxpayer's total income to determine the applicable tax rate would have unfairly benefited the nonresident taxpayer, when compared with the resident taxpayer.

portion of 1998 that he worked here, at the correct rate as dictated by Revenue and Taxation Code section 17041.

As to the late payment, penalty, Revenue and Taxation Code section 19132 provides for penalties to be assessed for failure to pay tax owed, unless it is shown that the failure is due to reasonable cause and not willful neglect. The burden is on the taxpayer to show that reasonable cause exists to support abatement of the late payment penalty. (Appeal of M.B. and G.M. Scott, Cal. St. Bd. Of Equal., Oct. 14, 1982.) To establish reasonable cause, appellant must show that the failure to timely pay the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (Appeal of Robert W. Sleight, Cal. St. Bd. Of Equal., Oct. 26, 1983.) Our determination of whether appellant's failure to make timely payment is due to reasonable cause and not willful neglect is based on all of the facts and circumstances attendant to this case, and we conclude that appellant has not established reasonable cause justifying relief. Appellant's primary argument is that the encountered problems in receiving the tax forms and in preparing his return. We have previously held that the complexity and problems associate with compiling a return is not reasonable cause for the failure to pay tax that is due (Appeal of J.B. and P.R. Campbell, Cal. St. Bd. Of Equal., Oct. 9, 1985); further, appellant admits that he received the tax forms on March 22, 1999, and that he timely filed them on or about March 27, 1999.

As to appellant's argument for an abatement of interest, the imposition of interest is mandatory. (Appeal of Amy M. Yamachi, Cal. St. Bd. Of Equal., June 28, 1977.) Further, interest is not a penalty, but is simply compensation for appellant's use of money after the due date of the tax. (See Appeal of Audrey C. Jaegle, Cal. St. Bd. Of Equal., June 22, 1976) The Franchise Tax Board is provided with the power to

abate the interest accrued on a deficiency only under the circumstances contemplated by statute. (Rev. & Tax. Code § 19104, suds. (c)(1) and (c)(2); § 19112; and § 21012.) We have consistently held this Board has no authority to review or alter an interest abatement decision of the Franchise Tax Board. (Appeal of Philip C. and Ellen Boesner Snell, 92-SBE-023, July 30, 1992.) By statue, the Legislature has now, in limited circumstance, conferred jurisdiction on this Board to review denials of interest abatement requests. (See Rev. & Tax. Code, § 19104, subd. (c).) However, that jurisdiction only extends to a request by a taxpayer to abate an interest assessment (i.e., after a Notice of Action, or as in this case, a Return Information Notice, has been issued) which is filed directly with respondent, and is denied by respondent, after January 1, 1998. That circumstance is not present here.

As to appellant's contentions regarding possible violations of his constitutional rights, Article III, section 3.5, of the California Constitution precludes this Board from deciding such constitutional issues. (See Appeal of Aimor Corporation, Cal. St. Bd. Of Equal., Oct. 26, 1983.) Appellant's remedy for alleged violations of his constitutional rights lie within a timely filed court action.

For the foregoing reasons, respondent's action is sustained.

PETITION FOR REHEARINF BEFORE THE BOARD OF EQUALIZATION

BOARD OF EQUALIZATION DECISION

Adopted September 14, 2000

CALIFORNIA STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL
DECISION ON PEITION FOR REHEARING

NOT TO BE CITED AS PRECEDENT

Appellant	Year	Claim for Refund[1]
Mark Staples	1998	$2,465
Case No. 29992		

Representing the Parties
For Appellant:
Mark A. Staples
For Franchise Tax Board:
Greg W. Heninger, Legal Analyst

Counsel for Board of Equalization:
John Frankot, Tax Counsel

Upon consideration of appellant's petition for rehearing, we conclude that the grounds set forth in the petition do not constitute good cause for a new hearing, as required by the Appeal of Wilson Development, Inc. (94-SBE-007), decided by this Board on October 5, 1994. Appellant has presented no arguments or evidence that substantially differ from any of the arguments of evidence that have been

[1] According to respondent $2,465.00 is appellant's correct total part-year resident California tax liability; however, his claim is actually for a refund of $1,141.00 in tax ($2,465.00 less $1,324.00 appellant contends is the correct total tax), and for a late payment penalty ($29.78) and interest (0.33).

previously considered.

As to appellant's concerns that the method respondent used to calculate the tax due violates his constitutional rights, this Board is precluded from declaring a statue unenforceable or refusing to enforce a statute on constitutional grounds, pursuant to Article III, section 3.5 of the California Constitution, unless an appellate court has determined the statute to be unconstitutional. (See Appeal of Aimor Corp., Cal. St. Bd. Of Equal., Oct. 26, 1983.) We are unaware of court decisions declaring all or any part of Revenue and Taxation Code section 17041, to be unconstitutional. However, we note that appellant is entitled to file a timely suit for refund and raise any such issues in the action. (See Rev. & Tax. Code, § 19381 et seq.)

Therefore, the petition is denied and this Board's order of June 15, 2000, is affirmed.

SUPERIOR COURT TENTATIVE RULING AND RECUSAL

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE & TIME : MARCH 6, 2001
DEPT. NO : 53
JUDGE : CHARLES C. KOBAYASHI
CLERK : S. SLOCUMB
RECORDER : NONE
BAILIFF : L. STEWART

[Case No.]00AS06829

MARK A. STAPLES VS. FRANCHISE TAX BOARD

MOTION FILED BY: SCHELL, JOHN D.

ATTORNEYS PRESENT:

NATURE OF PROCEEDING: Demurrer

TENTATIVE RULING

The gist of plaintiff's complaint is that Revenue and Taxation Code Section 17041(b) is unconstitutional. It is not. The demurrer is sustained without leave to amend.

Defendant shall submit a formal order pursuant to CRC Rule 391.

COURT RULING

Judge Charles C. Kobayashi hereby recuses himself pusuant to CCP 170.1(a)(6). Consequently, the demurrer is continued to March 19, 2001 at 9:00 a.m. in Department 54. A new tentative ruling will issue on March 16, 2001.

SUPERIOR COURT ORDER SUSTAINING DEMURRER

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SUPERIOR COURT OF CALIFRONIA
COUNTY OF SACRAMENTO

MARK A. STAPLES
Plaintiff,
v.

FRANCHISE TAX BOARD,
Defendant.

Case No. 00AS06829

~~PROPOSED~~ ORDER SUSTAINING DEMURRER OF FRANCHISE TAX BOARD AND JUDGEMENT OF DISMISSAL

DATE : MARCH 19, 2001
TIME : 9:00 a.m.
DEPT : 54

ORDER SUSTAINING DEMURRER

The demurrer of the Franchise Tax Board to plaintiff's Complaint for Refund of Individual Income Tax came before the court for hearing on March 19, 2001, the Honorable Joe S. Gray, presiding. Mark A Staples, in pro per, appeared by telephone. After listening to the oral argument and considering the written record, the court affirms its tentative ruling as follows:

> " The gist of plaintiff's complaint is that Revenue and Taxation Code Section 17041(b) is unconstitutional. It is not. The demurrer is sustained without leave to amend. "

DATED : MAR 28, 2001

JOE S. GRAY

THE HONORABLE JOE S. GRAY
JUDGE OF THE SUPERIOR COURT

April 3, 2001, Notice of entry of judgment

COURT OF APPEAL RULING

NOT TO BE PUBLISHED
COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELATE DISTRICT

(Sacramento)

MARK A. STAPLES
Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD,
Defendant and Respondent.

Court of Appeal No. C038428
Super. Ct. No. 00AS06829

April 10, 2002, Filed

Plaintiff Mark A. Staples lived and worked in California for six months in 1998. He also lived and worked in Delaware for six months in 1998. Unhappy with his California state tax bill, Staples requested a tax refund, contending California taxed his Delaware income. After denial of his refund, Staples appealed to the State Board of Equalization (Equalization), which denied his appeal. Staples filed a complaint against defendant Franchise Tax Board (Board), alleging the Board taxed his income earned while a resident of Delaware in violation of his constitutional rights. The Board demurred to the complaint. The trial court sustained the demurrer without leave to amend. Proceeding in pro. per., Staples appeals, arguing the

Board's action violates the United States Constitution by taxing property acquired in another state, by taxing without representation, and by interfering with his right to travel. He also contends the trial court erred in not considering his fraud claim against the Board's Taxpayer Advocate Bureau. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Staples resided, registered to vote, and worked in California from January 1 through June 12, 1998. In June 1998 Staples traveled to Delaware for more lucrative employment. Staples resided, registered to vote, and worked in Delaware from June 13 through December 30, 1998.

In June 1999 Staples requested reimbursement from the Board in the amount of $1,141 plus interest. According to Staples, this amount reflected the tax imposed by California on his Delaware earnings in 1998. The taxpayer advocate assigned to his case informed him she was treating his request as a claim for a refund, which she subsequently denied.

Staples appealed the denial to Equalization. Equalization upheld the taxpayer advocate's decision.

Subsequently, Staples filed a complaint against Board, alleging California taxed his Delaware income in violation of his constitutional rights. The Board demurred to the complaint.

Following oral argument, the trial court issued a tentative ruling. The court stated: "The gist of plaintiff's complaint is that Revenue and Taxation Code Section 174041 (b) is unconstitutional. It is not. The demurrer is sustained without leave to amend." The court later adopted the tentative ruling and entered a judgment of dismissal. Staples filed a timely notice of appeal.

I

We review de novo an order sustaining a demurrer without leave to amend; we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (*Montclair Parkowners Assn. V. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) In analyzing the complaint, we give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).)

If the complaint fails to state a cause of action, we then review under the abuse of discretion standard the court's decision not to allow plaintiff leave to amend. The court abuses its discretion to sustain a demurrer without leave to amend if the plaintiff shows a reasonable possibility any defect identified by the defendant be cured by amendment. (*Aubry, supra*, 2 Cal.4th at pp. 966-967.)

II

At the center of Staples's complaint lies the computation of his state income tax in a year in which he divided his time evenly between Delaware and California. According to Staples, this calculation allows California to tax his Delaware income and runs afoul of various constitutional provisions.

The State of California calculated Staples's taxable income pursuant to Revenue and Taxation Code 17041, which provides, in part: "(a) (1) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state . . . taxes in the following amounts and at the following rate upon the amount of the taxable income. [¶] . . . [¶] (b) There shall be imposed for each taxable year upon the entire taxable income of every nonresident or part-year resident which is derived from sources in this state . . . a tax which shall be equal to the tax computed under

subdivision (a) as if the nonresident or part year resident were a resident multiplied by the ratio of California adjusted gross income to total adjusted gross income from all sources." [1]

Under section 17041, the state computes the tax rate to be applied based on total taxable income, as is the person was a full year California resident. The state then applies the ratio of California income to total income to calculate the California tax. In other words, the tax rate takes into account the out-of-state income, but this rate applies only to income earned in California

III

Defendant argues that since California includes his Delaware income in computing his tax rate, the Delaware income is taxed by California. As the Board acknowledges, no California case addresses this issue. However, two courts in other jurisdictions have considered the inclusion of income earned out of state for a determination of the applicable tax rate.

In *Brady v. State of New York* (1992) 80 N.Y.2d 596 [592 N.Y.S. 2d 955, 607 N.E.2d 1060] (*Brady*), plaintiffs challenged New York's method of determining the nonresident tax on income earned in New York, whereby New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to the New York income. (*Id.* at p. 1061.) The New York Court of Appeals found the inclusion of out-of-state income in the computation of the tax rate did not constitute a tax on the out-of-state income. The court held: "[T]he subject matter here regulated is a tax on in-State income, which is within the jurisdiction of the State. When the State levies taxes within its authority, ' property not itself taxable

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[1] All further statutory references are to the Revenue and Taxation Code.

can be used as measure of the tax imposed on the property within the state and . . . to do so is "in no just sense a tax on foreign property.'" [Citation] " (*Id.* at p. 1064.)

In a similar vein, in *Wheeler v. State of Vermont* (1969) 127 Vt. 361 [249 A.2d 887] (Wheeler), a nonresident taxpayer sought reduction of his state income tax in Vermont, arguing Vermont was taxing income in Vermont, arguing Vermont was taxing income he earned in New Hampshire. The taxpayer argued inclusion of his out-of-state income moved him into a higher tax bracket, increasing his taxes. The court in *Wheeler* responded: "It is the argument of the plaintiff that, since the addition of New Hampshire income increases the tax, it must be New Hampshire that is being taxed. However, in reality what is happening is that Vermont income is being taxed at an increased rate, and nothing more." (*Id.* at 890.)

Both *Brady* and *Wheeler* hearken back to the Supreme Court decision in *Maxwell v. Bugbee* (1919) 250 U.S. 525 [40 S.Ct. 2, 63 L.Ed. 1124] (*Maxwell*). In *Maxwell*, the court upheld a state inheritance tax that determined the tax rate by including the entire estate, wherever located. The plaintiffs challenged the statute setting forth the inheritance tax calculation, arguing it taxed nonresidents more than residents, giving residents privileges and immunities denied to nonresidents and denying nonresidents equal protection of the laws. The plaintiffs also alleged the statute deprived nonresidents of property without due process of law. (*Id.* at p. 535.)

The *Maxwell* court found the tax was not imposed on out-of-state assets: "It is not to be disputed that, consistently with the federal Constitution, a state may not tax property beyond its territorial jurisdiction; but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the

tax imposed. . . . In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so, within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of tax. It is in no just sense a tax upon the foreign property, real or personal." (*Maxwell, supra*, 250 U.S. at p. 539.) [2]

Staples attempts to distinguish *Brady, supra*, 607 N.E.2d 1060 and *Wheeler, supra*, 249 A.2d. 887, arguing the plaintiffs in those cases were taxpayers of one state working in another state, not part-time residents of two states. We find this difference insignificant. *Brady* and *Wheeler* found income earned in another state may constitutionally be included in

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[2] We note Justice Holmes authored a strong dissent in *Maxwell*, stating : "It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States." (*Maxwell, supra*, 250 U.S. at p. 544 Judge Hancock's dissent in *Brady, supra*, 607 N.E.2d at pages 607-609 echoed Justice Holmes's dissent and concluded: "A statute which includes out-of-State income of the taxpayer and the taxpayer's spouse for the purpose of increasing the tax on the in-State income and which results in such increase imposes a tax on the out-of-State income in violation of the Due Process Clause - - no matter how the tax is described." (Id. at p. 609.)

determining the rate of tax on in-state income. As the Board points out, whether out-of-state income is earned by a part-year resident or a full-year resident working out of state is no germane to this issue.

Staples also contends *Brady* and *Wheeler* concerned the graduated tax in general, not taxation of nonresident income. However, in both cases the progressive-rate issue arose in the context of taxation of out-of-state income. As the *Brady* court noted: "Plaintiffs first claim that by setting tax rates with reference to adjusted gross income, New York taxes no-New York income, thus taking property in violation of due process." (*Brady, supra,* 607 N.E.2d at pp. 1062-1063.) Similarly, the court in *Wheeler* noted: "It is the argument of the plaintiff that, since the addition of New Hampshire income increases the tax, it must be New Hampshire income that is being taxed." (*Wheeler, supra,* 249 A.2d at 890.) In each case the graduated rate, based in part on the nonresident income, resulted in the higher tax the plaintiffs objected to.

The triumvirate of *Wheeler, Brady, and Maxwell* supports the trial court's finding that section 17041 is constitutional. Section 17041 does not tax Staples's Delaware income. We find the court did not err in sustaining the Board's demurrer without leave to amend.

IV

On appeal, Staples also argues the trial court failed to considered the allegations of fraud against the Taxpayer Advocate Bureau. However, in the claim for a refund filed with the Board, Staples raised only the constitutional issue of taxation without representation. As the Board points out, a suit for refund of tax is limited to the grounds stated in the claim filed with the Board.

Section 19382 states: "Except as provided in Section 19385, after payment of the tax and denial by

the Franchise Tax Board of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring an action, upon the grounds set forth in that claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid." Section 19322 provides, in part, "Every claim for refund shall be in writing . . . and shall state the specific grounds upon which it is founded.

"The claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. [Citation.] The trial court and this court are without jurisdiction to consider grounds not set forth in the claim. [Citation.]" (*Atari, Inc. v. State Board of Equalization* (1985) 170 Cal.App.3d 665, 672, fn. omitted.)

Staples contends the Board changed his informal request letter into a claim. We disagree. Staples's letter requests the return of money he believed the Board collected in violation of his constitutional rights. The letter set forth a claim for a refund of taxes paid by Staples to the State of California.

Staples also focuses on language in a letter from the Board that states: "Since your tax for your 1998 tax year is paid, I am treating your letter as a claim for refund." According to Staples, this language reveals an intent to metamorphose his informal request into a claim. We do not find such an insidious message in this language. The Board merely sought to characterize, not change, Staples's request.

We find the trial court properly considered only the challenges enumerated in Staples's claim: taxation without representation. Accordingly, these are the only claims we consider on appeal.[3]

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[3] We do not address Staples's arguments concerning his right to travel, conflict of law, or fraud.

DISPOSITION

The judgment is affirmed. The Board shall recover costs on appeal.

RAYE, acting P.J.

We concur:

Morrison, J.

Hull, J.

REQUEST FOR PUBLICATION OF APPELLATE OPINION

BILL LOCKYER
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DEPARTMENT OF JUSTICE

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May 10, 2002

Court of Appeal
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814-4869

RE: Appellate Court Case No. C038428
Superior Court Case No. 00S06829
Staples v. Franchise Tax Board

Dear Justices:

The Franchise Tax Board of the State of California, Defendant and Respondent in the above action, requests publication of the April 10, 2002 decision rendered in the above case. (A copy of the decision is provided with this letter for the convenience of the Court.) This request is made pursuant to California Rule of Court 978.

As noted in the Opinion (at pp.4-5), there is no published California case treating the issue presented-whether "income earned in another state may constitutionally be included in determining the rate of tax on California income." (Opinion at p. 7.) Thus, the Franchise Tax Board is currently required to rely on out-of-state decisions, including decisions from New York and Vermont. Although the Court's holding that non-California income may be used to compute the rate of tax applied to California income does not establish a new rule of law, it clearly enunciates an important principle of tax law that has not been addressed before in California case law.

In addition, this is an issue of continuing public interest in that the Franchise Tax Board defends numerous administrative appeals each year based on challenges to the constitutionality of the California method of computing the rate of tax when a taxpayer is required to file a part- year or nonresident return. The State Board of Equalization received and adjudicated, and the Franchise Tax Board defended, an average 123 taxpayer appeals a year, for the years 1999-2001, that challenged the California method of calculating the rate of tax on nonresident and part-year resident California income. A published California appellate court decision would go far to allay taxpayer concerns and confusion on the issue.

Finally, the Opinion also makes a significant contribution to the judicial history of the constitutional question presented by authoritatively and concisely discussing and integrating the non-California authorities on point from 1919 to present.

For all the above reasons, the Franchise Tax Board requests that the decisions of the Court in the above case be published.

Sincerely,

AMY J. WINN
Deputy Attorney General

s/_____
For BILL LOCKYER
Attorney General

COURT OF APPEAL TO CALIFORNIA SUPREME COURT

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Court of Appeal

THIRD APPELLATE DISTRICT

STATE OF CALIFORNIA

May 20, 2002

Mr. Frederick K. Ohlrich
Clerk/Administrator of the
California Supreme Court

350 McAllister Street
San Francisco, CA 94102

Re: Staples v. Franchise Tax Board
C038428
Sacramento County
No. 00AS06829

Dear Mr. Ohlrich:

Respondent has requested that the opinion in the above case be published. The members of the court who participated in the opinion have reviewed the request and recommend that publication be denied for the following reasons.

1. The opinion does not establish a new rule of law nor alter nor modify an existing rule of law.

2. The opinion does not criticize an existing rule of law nor interpret it.

3. The opinion merely applies existing, clear, unambiguous law to a singular and particular set of facts.

In accordance with rule 978(a) of the California Rules of Court, enclosed are copies of the opinion and the request for publication.

Very truly yours,

DEENA C. FAWCETT
Clerk/Administrator

By: s/ Sandy Green
Deputy Clerk

CC: See Mailing List

RULING OF CALIFORNIA SUPREME COURT

Court of Appeal, Third Appellate District – No. C038428

S106630

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK A. STAPLES, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD, Defendant and Respondent.

Petition for review DENIED.
The request for an order directing publication of the opinion is denied.
Kennard, J., was absent and did not participate

GEORGE
Chief Justice

Supreme Court
FILED
JUN 19 2002
Frederick K. Ohlrich Clerk

DEPUTY

DISSENTING OPINION IN *BRADY v. NEW YORK*

Note: Emphases in the following have been lost.

LAWRENCE J. BRADY, ET AL., APPELLANTS, v. THE STATE OF NEW YORK, ET AL., RESPONDENTS.

80 N.Y.2d 596, 607 N.E.2d 1060, 592 N.Y.S.2d 955 (1992).

December 22, 1992

This opinion is uncorrected and subject to revision before publication in the New York Reports.

David H. Weinstein, for Appellants.
Daniel Smirlock, for Respondents.
New Jersey State Assembly, amicus curiae.

KAYE, J.:

Plaintiffs Lawrence Brady and Barbara Brady are married and reside in New Jersey. Plaintiffs Deborah Labovitz and Judah Labovitz are married and reside in Pennsylvania. At all relevant times, Lawrence Brady and Deborah Labovitz earned income in New York, and Barbara Brady and Judah Labovitz earned income outside New York; in addition, the Labovitzes had a combined adjusted gross income of more that $100,000 and received unearned income from non-New York sources. Both couples filed joint federal tax returns. Plaintiffs challenge New York's method of determining the nonresident tax on income earned in New York, whereby New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to the New York income.

...

I.

...

Thus, plaintiffs' due process challenge was correctly rejected by the courts below.

II.

...

Again, plaintiffs have failed to establish that the challenged tax is unconstitutional.

III.

...

Accordingly, the order of the Appellate Division should be affirmed ....

HANCOCK, J. (dissenting):

No state may impose a tax on income earned outside of the state by a nonresident. That is settled constitutional law. Under the statute at issue, New York considers income earned outside of the State for purposes of determining the rate at which it will tax a nonresident's New York income. Because New York has a progressive tax rate structure, the result of including the out-of-state income is a higher tax rate and a higher tax on the New York income. The question in this case is whether by considering the nontaxable out-of-state income in determining the tax rate on the New York income, the State is, in reality, taxing the out-of-state income and doing indirectly what it cannot do directly.

The answer to the question, of course, is the one dictated by logic and
common sense: the State is taxing the outside income. Including it results in a higher tax bracket and the nonresident pays more tax on the New York income. But, the State maintains that this is not so. There is a distinction, it says, which "is straightforward and obvious. State taxes on nonresidents may be measured

by income outside the state as long as they are not imposed on such income" (Respondents' brief, at 17 [emphasis added]).

While the claimed distinction between taxing out-of-state income and using it as a measure of the tax that is ultimately imposed hardly seems "straightforward" or "obvious", my colleagues are apparently content with it and find satisfactory precedent in two decisions of the Supreme Court -- one handed down seventy-three years ago, *Maxwell v Bugbee* (250 US 525), and the other fifty-five years ago, *Great Atlantic & Pacific Tea Co. v Grosjean* (301 US 412). I believe that these decisions do not control this case. They do not reflect the Supreme Court's express rejection of labelling and formalism and its adoption instead of economic reality as the current approach to problems involving state taxation of out-of-state income of nonresidents (see, e.g., *Mobil Oil Corp. v Commissioner of Taxes*, 445 US 425, 440-441; *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279).[n 1]

For this reason, I respectfully dissent.

The case of *Maxwell v Bugbee* (250 US 524) -- the basis of the Attorney General's "straightforward and obvious" distinction between measuring a tax on out-of-state income and taxing out-of-state income -- was decided in 1919 by a vote of five to four.[n 2] The *Maxwell* majority, adopting the more formalistic approach of that time, dismissed the due process objection to the inclusion of out-of-state property in determining the tax on the privilege of transferring property within the state. It simply announced, without explanation of its reasoning, that the inclusion of the out-of-state property does not result in a tax on it, but "merely affords a measure of the tax imposed" (*Maxwell, supra*, at 535).

The soundness of the *Maxwell* decision has been questioned by the Court itself (see, *Frick v Pennsylvania*, 268 US 473, 495 [*Maxwell* "is on the borderline, as is evidenced by the dissent of four members of the Court"]; see also, Hellerstein, Some Reflections On the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1317 n 53 [*Maxwell* riddled with "dubious logic"]; Lowndes, Rate and Measure in Jurisdiction To Tax -- Aftermath of *Maxwell v Bugbee*, 49 Harv L Rev 756, 770 [it is difficult "to imagine anything more iniquitously unfair than the application of the *Maxwell* formula to income taxation"]).

Justice O. W. Holmes, Jr., viewing the substance of the statute in *Maxwell* and its effect on the taxpayer with the frank realism for which he was noted,[n 3] dissented. Joined by Chief Justice White and Justices VanDevanter and McReynolds, Justice Holmes wrote:

> It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States (*Maxwell, supra*, at 544 [Holmes, J., dissenting] [emphasis added]).

Consistent with Justice Holmes' pragmatic approach, in the past half century, the Supreme Court has moved away from its earlier reliance on the *Maxwell*-type of formalism and embraced a method of analysis based on "the practical effect of a challenged tax" (*Mobil Oil Corp, supra*, at 443) and on "economic realities" rather than "formal phrasing" (*Complete Auto Transit, supra*, at 278-280 [overruling *Spector Motor Service v O'Connor*, 340 US 602, which had deemed

"irrelevant any consideration of the practical effect of the tax"]; see also, *Allied-Signal, Inc. v Director, Division of Taxation*, 60 USLW 4554, 4556; *ASARCO v Idaho State Tax Commission*, 458 US 307, 319; *Exxon v Wisconsin Dep't of Revenue*, 447 US 207, 223-224; *Wisconsin v JC Penny Co.*, 311 US 435, 444).

If the tax in question is analyzed with the candor employed by Justice Holmes in his *Maxwell* dissent and by the Supreme Court in its recent decisions, there can be no question that the practical effect of including out-of-state income for the purpose of increasing the rate on the in-state income is a tax on the out-of-state income. The majority does not dispute this proposition. Instead, it cites state cases, which, with no explication, have accepted the *Maxwell* procedure of deciding by labelling (see, Maj Opn, at 7 [citing *Stevens v State Tax Assessor*, 571 A2d 1195 (Me); *Wheeler v Vermont*, 249 A2d 887 (Vt)]). That Vermont and Maine have cited *Maxwell* with approval, of course, does not mean that the decision is regarded with favor by the Supreme Court. [n 4] The Vermont Supreme Court, it should be noted, decided Wheeler in 1969, prior to the Supreme Court cases expressly renouncing the formalistic approach. In *Stevens*, the Supreme Court of Maine merely followed *Wheeler* in its uncritical acceptance of *Maxwell*.

Whether the Court will again resort to the *Maxwell*-type of labelling [n 5] in order to uphold a taxing scheme -- where out-of-state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income -- only the Supreme Court can tell us. If the answer should be "yes", then I respectfully submit that the answer would be inimical to Justice Holmes' common sense appraisal of the tax in *Maxwell* and to the Court's recent method of analyzing state taxation Due Process problems by looking at the practical effect and the economic realities rather than "formal phrasing" (*Complete Auto*

Transit, supra, at 280; see, e.g., *Mobil Oil Corp, supra* at 443). A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause -- no matter how the tax is described. To pretend that it does not endorses a Due Process violation and works a distinct unfairness on taxpayers such as the New Jersey and Pennsylvania residents in this case.

FOOTNOTES

1. That these cases address the extraterritorial reach of corporate taxes, as the majority notes (Maj opn, at 8), is of no moment. Their significance for present purposes is not their specific holdings but the methodology employed by the Court in analyzing the statutes: i.e., looking to the practical effect and economic realities of the tax in issue.

2. *Great Atlantic & Pacific Tea Co. v Grosjean* (301 US 412), involving a chain store tax based on the total number stores in the chain, is cited by the majority but is not discussed in the opinion. It adds nothing to the argument (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan Law Review 1309, 1317 n 53 [*Grosjean* "may be viewed as a case primarily involving the state's police power to regulate the growth of chain stores"]).

3. see, e.g., Holmes, Path of the Law, 10 Harv l Rev 457; Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought, 66 Cornell L Rev 861, 866-869; Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell Law Quarterly 568; Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 Northwestern Univ L

Rev 541; Lyons, Legal Formalism and Instrumentalism, 66 Cornell L Rev 949 (Professor Lyons writes at p. 949: "Holmes and those who followed in his wake believed they were rejecting a frigid and impoverished conception of the law [often called 'formalism'] which had, in their view, adversely affected judicial practice. They spawned a collection of doctrines that Professor Summers dubs 'pragmatic instrumentalism' - fittingly so-called both because they viewed the law as an eminently practical instrument and because they were so strongly influenced by the philosophical pragmatists William James and John Dewey").

4. Indeed, the decision in *Wheeler* does not address the issue of whether out-of-state income is a permissible consideration in setting the rate of tax on in-state income (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1318). The decision, as far as it concerned due process, addressed only whether the Vermont had in fact taxed *Wheeler*'s out-of-state income.

5. Avoiding a due process challenge by proclaiming that the statute "merely affords a measure of the tax imposed" as in *Maxwell* is the sort of formalism in decision-making which the Court repudiated in *J.C. Penny* (*supra*):

> [T]he descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."*Henderson v Mayor of New York*, 92 US 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for

adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with the practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v State Tax Commission*, 268 US 276, 280 (*Wisconsin v J.C. Penny Co.*, 311 US at 443- 444)."

...